No. 10,303

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WASHINGTON BREWERS INSTITUTE, REGAL AMBER BREWING COMPANY, WILLIAM P. BAKER, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

BRIEF FOR APPELLANTS, REGAL AMBER BREWING COMPANY AND WILLIAM P. BAKER.

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Table of Authorities Cited

Table of Contents

Codes and Statutes

Texts

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STATEMENT AS TO JURISDICTION.

On March 5, 1941, the grand jury of the United States of America, in and for the Northern Division of the Western District of Washington, presented to and filed in the United States District Court of said district an indictment charging appellants, Regal Amber Brewing Company and William P. Baker, among others, with violation of Sections 1 and 3 of the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against

Unlawful Restraints and Monopolies." (26 Stat. 209.) (Trans. p. 5.)

These appellants demurred to said indictment. (Trans. p. 38.) The demurrers, so interposed, were overruled by an order duly made, given and filed on January 19, 1942. On the 26th day of October, 1942, each of these appellants entered a plea of *nolo contendere* to both counts of said indictment and the Court on said last mentioned day entered its judgment fining defendant-appellant, Regal Amber Brewing Company, the sum of one thousand dollars ($1000.00) on Count One and the sum of one dollar ($1.00) on Count Two of said indictment. (Trans. p. 112.) Also on the same day, said Court entered its judgment fining defendant-appellant, William P. Baker, the sum of two hundred fifty dollars ($250.00) on Count One and the sum of one dollar ($1.00) on Count Two of said indictment. (Trans. p. 60.) Thereafter on said 26th day of October, 1942, the defendants, Regal Amber Brewing Company and William P. Baker, filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgments on the ground that the indictment herein, as to either or both counts thereof, does not state facts sufficient to constitute an offense against the United States, nor a violation of any law of the United States. (Trans. p. 156.)

STATEMENT OF CASE.

The defendants (appellants here) are charged in Count One of the indictment with having violated Section 1 of the Sherman Act. (26 Stat. (1890) 209, 15 U. S. C. A. §1.) The pertinent portions of that section read as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

They are charged in Count Two with having violated Section 3 of the Sherman Act, of which the pertinent portions read as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal."

The violation of each section is by the terms thereof declared to be a misdemeanor.

Count One of the indictment alleges that the defendants have "wilfully and unlawfully formed and engaged in a wrongful and unlawful combination and conspiracy to raise, fix, stabilize and maintain, uniform, artificial and non-competitive prices for beer sold and distributed in the Pacific Coast Area in in-

terstate trade and commerce". (Paragraph 16 of Indictment, Trans. p. 18.) The Pacific Coast Area is defined in the indictment as "those territories comprised within the States of Washington, California, Idaho and Oregon". (Paragraph 8 of Indictment, Trans. p. 8.) Secondly, it is alleged that, as a part of said conspiracy and in pursuance thereof, said defendants "have arbitrarily, wilfully and unlawfully raised, fixed, stabilized and maintained uniform, artificial, and non-competitive prices in the sale of beer in interstate trade and commerce in the Pacific Coast Area as aforesaid." (Paragraph 16 of Indictment, Trans. p. 18.)

The gist of the conspiracy as alleged is one to fix prices for beer *sold and distributed* in the Pacific Coast Area and the various acts alleged have to do with the *sale and distribution* of beer in the Pacific Coast Area.

Similarly, the conspiracy alleged in Count Two of the indictment is one to fix, stabilize and maintain uniform, artificial and non-competitive prices for beer *sold and shipped* in trade and commerce between the states of the Pacific Coast Area and the Territory of Alaska (Paragraph 21 of Indictment, Trans. p. 30), and the various acts alleged have to do with the *sale and distribution* of beer in trade and commerce between states in the Pacific Coast Area and the Territory of Alaska.

These appellants interposed demurrers to said indictment; which demurrers were overruled.

I.

THE GENERAL CONTENTION OF THESE APPELLANTS.

The position of these appellants in interposing their demurrers in the Court below should be defined before examining in detail the legal reasoning which supports the demurrers. The contention of these appellants may be stated briefly.

Each of the states comprising the Pacific Coast Area and the Territory of Alaska has a complete and comprehensive set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer within, from and into its borders,[1] and also has laws forbidding restraints of trade or commerce and the fixing or maintaining of artificial or non-competitive prices of commodities generally, but applicable to beer and other intoxicating liquors.[2]

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[1]The names of the liquor control acts and the citations thereof are as follows:

(a) California Alcoholic Beverage Control Act, Calif. Gen. Laws No. 3796.

(b) Idaho Liquor Act, Idaho Laws, 1939, page 465, C. 222, and page 584, C. 242, as amended in Idaho Laws, 1941, page 20, C. 10.

(c) Oregon Liquor Control Act, Ore. Comp. Laws, §24-101 to §24-514.

(d) Washington State Liquor Act, Rem. Rev. Stat. of Wash. §7306-1 to §7306-97a.

(e) Alaska Liquor Control Act, Ses. Laws of Alaska, 1937, C. 78 (an express act of Congress, 48 U.S.C.A. §§292 and 293, gave the Alaska territorial legislature the power to regulate the sale of intoxicating liquors within the territory).

[2]The anti-trust laws involved are as follows:

(a) *California*—Cartwright Anti-Trust Act, Calif. Gen. Laws, No. 8702, now Sections 16700 to 16758, Cal. Bus. & P. Code, prohibits illegal trusts and combinations; the Unfair Practices Act, Calif. Gen. Laws No. 8781 and the Fair Trade Act, Calif. Gen. Laws, No. 8782, now Sections 16900 to

A brief summary of the various liquor control laws of the Pacific Coast Area States and the Territory of Alaska will be found in the Appendix hereto.

This Court will take judicial notice of the existence of these various laws. (*Elwood v. Flannigan* (1882) 104 U. S. 562, 26 L. Ed. 842; and see 23 C. J. 127, footnote 71.)

The Sherman Act was passed in 1890 and is directed against the restraint of interstate or foreign trade,

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16905 of Cal. Bus. & P. Code, prohibit sale of commodities below certain prices.

(b) *Idaho*—Restrictions or combinations in restraint of trade and the anti-trust laws appear in Idaho Constitution Art. II, §18, and Idaho Code, §§17-4013, and 47-101 to 47-117.

(c) *Oregon*—Specific restrictions are established in regard to particular acts, such as destroying competition in bidding for public contracts, substitution of trade-marked goods, preventing competitive bidding on livestock, and gasoline price fixing. There is an anti-price discrimination act (Ore. Comp. Laws, §§43-101 to 43-111), and a State fair trade act (Ore. Comp. Laws, §§43-401 to 43-405).

(d) *Washington*—Monopolies, trusts and price-fixing agreements are forbidden by Article XII, Section 22 of the Washington Constitution. Non-profit corporations forfeit their charters for attempting to restrain trade (Rem. Rev. Stat. of Wash. §3898). Conspiracies in restraint of trade are punishable criminally (Rem. Rev. Stat. of Wash. §2382). The state also has a fair trade act (Rem. Rev. Stat. of Wash. §§5854-1 to 5853-36).

(e) *Alaska*—The following provisions appear in Section 3271 of the Compiled Laws of Alaska:

> "So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska, is adopted and declared to be law in the Territory."

Combinations or agreements which tended to create a monopoly, unreasonably suppress competition, or restrain trade were illegal and void at common law and against public policy (41 C.J. 99 to 101). Consequently, the Territory of Alaska has an anti-trust law which follows simply the established common law rule, adopted by reference. This conclusion is supported by a statement appearing in Session Laws of Alaska, 1939, Chap. 13, at page 74.

that is, against restraining the business of buying and selling for gain whenever the transaction forms a part of commerce among the states or with foreign countries. (*U. S. v. Keystone Watch Case Co.* (1915) 218 Fed. 502, 515.) There must, however, be some direct and immediate effect upon interstate commerce in order to come within the Sherman Act. (*Hopkins v. U. S.* (1898) 171 U. S. 578, 43 L. Ed. 290.)

It is well settled, therefore, that if the subject matter of the alleged conspiracy, *does not relate to and act upon* interstate commerce, then it is *not* within the terms of the Sherman Act and is subject only to the laws of the state.

Hopkins v. United States (1898) 171 U. S. 578, 43 L. Ed. 290;

Anderson v. United States (1898) 171 U. S. 604, 43 L. Ed. 300;

Addyston Pipe & Steel Co. v. U. S. (1899) 175 U. S. 211, 44 L. Ed. 136;

U. S. v. E. C. Knight Co. (1895) 156 U. S. 1, 39 L. Ed. 325;

Industrial Assn. v. U. S. (1925) 268 U. S. 64, 69 L. Ed. 849.

In *Addyston Pipe & Steel Co. v. U. S.,* supra, the Court said (at p. 247):

> "Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part

> of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also governs and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state."

Where the sales and distributions are made after the goods have ceased to be a part of interstate commerce and constitute intrastate commerce, any conspiracy having for its object the creation of a monopoly in such commodity which is sold in intrastate commerce is subject only to the laws of the states affected thereby.

> *Waters-Pierce Oil Company v. Texas* (1909) 212 U. S. 86, 99, 53 L. Ed. 417;
>
> *Standard Oil Co. v. State* (1914) 107 Miss. 377, 65 So. 468;
>
> *State v. Racine Sattley Co.* (1911) 63 Tex. Civ. A. 663, 134 S. W. 400.

It is our contention that the conspiracy and acts charged in this indictment relate to the *sale and distribution of goods which must, as a matter of law, be treated like articles in intra-state commerce,* not like articles of interstate commerce; that by reason of the Twenty-first Amendment to the Constitution of the United States, and by reason of the laws of Congress, notably the Webb-Kenyon and Wilson Acts, hereinafter cited and quoted, the subject-matter of the alleged conspiracy is subject to the laws of the respective states. The alleged conspiracy is to be tested as to its legality only by those state laws, since the al-

leged conspiracy does not act upon and embrace interstate commerce. In this respect the traffic in intoxicating liquors is distinct from trade and commerce in all other articles, because other articles have not been dealt with by the Constitution and by Congress in the same manner.

II.

HISTORICAL DEVELOPMENT OF THE STATUS OF INTOXICATING LIQUORS AS AN ARTICLE OF COMMERCE AMONG THE SEVERAL STATES.

For the purpose of greater clarity, we shall first present the historical development of the legal status of intoxicating liquors as respects:

a. The character of intoxicating liquors as articles of interstate commerce;

b. The powers of the National Government to regulate the transportation, importation and use of intoxicating liquors;

c. The powers of the states to regulate the transportation, importation and use of intoxicating liquors.

Thereafter, we shall apply the legal conclusions which flow from that status to the question of the sufficiency of the indictment in the case at bar.

We necessarily commence with the granting by the Federal Constitution of the power to Congress "To regulate commerce with foreign nations, and among the several states" (U. S. Const., Art. I, sec. 8, clause

3), and with the proposition that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U. S. Const., Amendment X.)

A. From the adoption of the United States Constitution to the enactment of the Wilson Act, August 8, 1890.

In 1847, there arose what are commonly known as *The License Cases* (1847) 46 U. S. 504, 12 L. Ed. 256. Each of the cases arose upon a state law passed for the purpose of discouraging the use of liquors within the state by prohibiting their sale in small quantities without a license so to do from the state. The point was made that these state licensing statutes were bad because repugnant to the Commerce Clause of the Federal Constitution. The Court (at p. 577), speaking through Chief Justice Taney, declared that liquors were

> "* * * admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists.
>
> "And Congress, under its general power to regulate commerce with foreign nations, may prescribe what articles of merchandise shall be admitted, and what excluded; and may therefore admit, or not, as it shall deem best, the inportation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no state has a right to prohibit their introduction.
>
> "* * * But although a State is bound to receive and to permit the sale by the importer of any

> article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

In a further opinion in *The License Cases,* Mr. Justice McLean stated (at p. 590):

> "It is admitted that a State law which shall prohibit importations of foreign spirits, being repugnant to the commercial power in the federal government, and contrary to the Act of Congress on that subject, would be void. The object of such a law would, upon its face, be a regulation of commerce, which is not within the powers of a State. But a State has a right to regulate the sale of this, as of every other imported article, *out of the hands of the importer."* (Italics ours.)

In 1889, just the year before the passage of the Sherman Act and the Wilson Act (26 Stat. (1890) 313, 27 U. S. C. A. §121), Mr. Chief Justice Fuller wrote the decision in *Leisy v. Hardin* (1889) 135 U. S. 100, 34 L. Ed. 128, declaring (at p. 125) that:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particu-

lar articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character."

The opinion in the *Leisy Case* stated also (at p. 109) that:

"Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free, and untrammeled. (Citing cases.)

"That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied."

The decisions of the United States Supreme Court make it clear that during the period from 1788 to 1890 the status of liquors was as follows:

a. Liquors had the character of and were articles of interstate commerce.

b. The power to regulate liquors in interstate commerce resided solely in the National Government under the powers delegated to it by the Commerce Clause of the Constitution.

c. The states had and could exercise their police powers to regulate liquors within their borders, but such power could not be exercised when such liquors had the character of articles in interstate commerce, which character continued while the liquors were in their original packages, in the hands of the importer.

B. From the enactment of the Wilson Act to the enactment of the Webb-Kenyon Act, March 1, 1913.

To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package in violation of state prohibitions, was the purpose which led to the enactment of the Wilson Act on August 8, 1890. (*James Clark Dist. Co. v. Western Md. R. Co.* (1916) 242 U. S. 311, 323, 61 L. Ed. 326.)

The Wilson Act was entitled "An act *to limit the effect of the regulations of commerce between the several States* and with foreign countries in certain cases." (Italics ours.) It provided that intoxicating liquors transported into any State or Territory or re-

maining therein for use, consumption, sale or storage therein,

> "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in like manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (26 Stat. (1890) 313, 27 U. S. C. A. §121.)

The Wilson Act was held to be constitutional in the case of *Re Rahrer* (1890), 140 U. S. 545, 35 L. Ed. 572. By this Act, Congress did not attempt to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States or to adopt State laws. Congress took its own course and made its own regulations, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. Congress did not use terms of permission to the State to act, but, according to the decision in the *Rahrer Case* (at p. 564),

> "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed but allowed imported property to fall at once upon arrival within the local jurisdiction."

It provided that a certain subject of interstate commerce, intoxicating liquor, shall be governed by a rule

which divests it of its interstate character at an earlier period than would otherwise be the case (*Re Rahrer,* supra) that is, after delivery to the consignee and *before sale* in the original packages. (*Rosenberger v. Pacific Express Co.* (1916) 241 U. S. 48, 60 L. Ed. 880; *De Bary v. Louisiana* (1913) 227 U. S. 108, 57 L. Ed. 441.) By the Wilson Act Congress did not intend to confer upon the states the power to give their statutes an exterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. (*Rhodes v. Iowa* (1898) 170 U. S. 412, 422, 42 L. Ed. 1088, 1095.)

The right to receive liquor was not affected by the Wilson Act (*James Clark Dist. Co. v. Western Md. R. Co.* (1916) 242 U. S. 311, 323, 61 L. Ed. 326.) But the Act placed intoxicating liquor coming within the state, after its arrival, "within the category of domestic articles of a similar nature". (*Re Rahrer* (1890) 140 U. S. 545, 35 L. Ed. 572.)

> "The purpose of the Wilson Act was to make liquor after its arrival a domestic product and to confer power upon the states to deal with it accordingly. The police power is, hence, to be measured by the right of a state to control or regulate domestic products, a state and not a Federal, question as respects the commerce clause of the Constitution." (*Pabst Brewing Co. v. Crenshaw* (1905) 198 U. S. 17, 27, 49 L. Ed. 925.)

And since it is "expressly provided that intoxicating liquors coming into a state should be as completely under the control of a state as if the liquor had been manufactured therein" the state had the power to

forbid the soliciting within its borders of proposals to purchase intoxicating liquors even though such liquors were situated in other states. (*Delameter v. South Dakota* (1907) 205 U. S. 93, 99, 51 L. Ed. 724.)

During this period from 1890 to 1913 the status of liquor, as it is revealed by the leading decisions of that period, was as follows:

a. Liquors had the character of and were articles of interstate commerce, and upon their entry into a state they continued to retain their interstate character if they were for the personal use of the consignee, but if not for the personal use of the consignee, the protection under the commerce clause afforded such liquors as articles of interstate commerce was withdrawn by virtue of the Wilson Act, and, immediately upon arrival and delivery to the consignee, they became subject to the operation and effect of the laws of the state, enacted in the exercise of its police powers.

b. The National Government had the sole power to regulate liquors from the consignor in one state to the consignee in another state, but upon the delivery to the consignee (if not for his own use) such liquors became forthwith subject to regulation by the states.

c. The states had the full power to regulate liquors within their borders, notwithstanding such liquors were in the hands of the original consignee, if they were not for such consignee's own use.

C. From the enactment of the Webb-Kenyon Act to the Adoption of the Eighteenth Amendment, January 29, 1919.

The Webb-Kenyon Act (37 Stat. (1913) 699, 27 U. S. C. A. §122) became effective on March 1, 1913. The title of the Act was *"An Act divesting intoxicating liquors of their interstate character in certain cases."* (Italics ours.)

It provides that the shipment or transportation of any intoxicating liquor from one state or territory to another, or from a foreign country, which is intended by any person interested therein to be received, possessed, sold or used in violation of any law of such state or territory, is prohibited. (27 U. S. C. A. §122.)

In 1914 the case of *Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 59 L. Ed. 1267, came before the United States Supreme Court on the question of the validity of a state statute making it unlawful for a public carrier to distribute liquors in any county where the *sale* had been prohibited. The effect of the Webb-Kenyon Act in its relation to the Wilson Act was carefully considered. The Court declared (at p. 198):

> "* * * before the passage of the Webb-Kenyon Act, while the state, in the exercise of its police power, might regulate the liquor traffic after the delivery of the liquor transported in interstate commerce, there was nothing in the Wilson Act to prevent shipment of liquor in interstate commerce for the use of the consignee, provided he did not undertake to sell it in violation of the laws of the state. The history of the Webb-Kenyon Act shows that Congress deemed this situation one requiring further legislation upon its

part, and thereupon undertook, in the passage of that act, to deal further with the subject, and to extend the prohibitions against the introduction of liquors into the states by means of interstate commerce. That the act (the Webb-Kenyon Act) did not assume to deal with all interstate commerce shipments of intoxicating liquors into prohibitory territory in the states is shown in its title, which expresses the purpose to divest intoxicating liquors of their interstate character in certain cases. What such cases should be was left to the text of the act to develop."

The Court continued (at p. 199):

"Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state, to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

The Webb-Kenyon Act was considered further in *James Clark Distilling Co. v. Western Maryland R.* Co. (1916) 242 U. S. 311, 61 L. Ed. 326, in which the Court said (at p. 326):

"* * * the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the Act of Congress ceased to apply."

The Court continued (at p. 330):

> "* * * the very regulation made by Congress, in enacting the Wilson Law to minimize the evil resulting from violating prohibitions of state law by sending liquor through interstate commerce into a state, and selling it in violation of such law, was to devest such shipments of their interstate commerce character and to strip them of the right to be sold in the original package free from state authority which otherwise would have obtained.
>
> "* * * the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other."

The purpose of the Webb-Kenyon Act, according to the *Clark Distilling Case,* was:

> "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means of subterfuge and indirection to set such laws at naught." (p. 324.)

The Act operated so as to cause the state law against shipment, receipt and possession to be applicable and controlling.

The Court said (at p. 325):

> "The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms devested by the Webb-Kenyon Act

> of their interstate commerce character, * * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution."

The Webb-Kenyon Act surrendered and left to the states the power to regulate the traffic in intoxicating liquors "free from the Commerce Clause of the Constitution as theretofore interpreted by the Courts." (*Dugan v. Bridges* (1936) 16 Fed. Supp. 694, at p. 707; appeal dismissed, 300 U. S. 684, 81 L. Ed. 887.)

In *Seaboard Airline R. Co. v. North Carolina* (1917) 245 U. S. 298, 62 L. Ed. 299, the petitioner was convicted of violating the state law in failing to allow its books concerning interstate shipments of liquor to be examined, and contended that the Webb-Kenyon Act did not authorize the enforcement of the state regulation in view of the fact that an act of Congress prohibited such action on its part. The Supreme Court declared (at p. 304):

> "The provisions of §15, Act to Regulate Commerce, here relied on, were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent Act (the Webb-Kenyon Act) Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect of them."

But the Webb-Kenyon Act was held to apply only to those things which the state law prohibited, and where receipt of liquor for personal use, not for resale, was not prohibited by the state law, then the

Webb-Kenyon Act did not apply, or change the rule that the states may not regulate commerce wholly interstate; and a shipment for personal use was consequently protected as interstate commerce. (*Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 59 L. Ed. 1267.)

The decisions of the highest Court of our country point out with precision that during the period from 1913 to 1919 the status of liquors was as follows:

a. Liquors were divested of their interstate character by virtue of the effect of the Wilson Act and the Webb-Kenyon Act provided that the state had enacted appropriate legislation.

b. The power to regulate liquors in interstate commerce resided solely in the National Government as long as such liquors retained their interstate character.

c. The police power of the state to regulate traffic in liquors attached immediately when an interstate shipment of such liquors reached its state line and such state could by appropriate state law absolutely prohibit the entry of any such liquors into its borders; in other words, the law of the state was paramount with respect to such liquors.

D. From the effective date of the Eighteenth Amendment to the adoption of the Twenty-first Amendment, December 5, 1933.

The Eighteenth Amendment to the Constitution was adopted on January 29, 1919, and became effective one year thereafter. By that Amendment, "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exporta-

tion thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes" was prohibited; and Congress and the several states were given "concurrent power to enforce this article by appropriate legislation".

Neither this Amendment nor the National Prohibition Act adopted pursuant thereto had the effect of repealing the Webb-Kenyon Act. (*McCormick & Co. v. Brown* (1932) 286 U. S. 131, 141, 76 L. Ed. 1017, 1024; *Ziffrin, Inc. v. Martin* (1938) 24 Fed. Supp. 924, 930, affirmed in 308 U. S. 509, 84 L. Ed. 435), or of repealing the Wilson Act. (*Premier Pabst Sales Co. v. McNutt* (1935) 17 Fed. Supp. 708.)

The Amendment added little to the power of the state to regulate intoxicating liquors imported from other states. As the Court said in *U. S. v. Lanza* (1922) 260 U. S. 377, 67 L. Ed. 314:

> "Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of country-wide prohibition, state power would be excluded. In effect, the 2d section of the 18th Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution, and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the 1st section of the Amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down

> or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the states, preserved to them by the 10th Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution." (p. 381.)

While prior to the adoption of the Eighteenth Amendment the only power possessed by the National Government with respect to the regulation of liquors was that derived from the commerce clause, the Amendment immediately vested the National Government with the power of intrastate regulation of liquors. As was stated in the *National Prohibition Cases* (1919) 253 U. S. 350, 64 L. Ed. 946,

> "The power confided to Congress by that section (section 2 of the 18th Amendment) while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in nowise dependent on or affected by action or inaction on the part of the several states or any of them." (p. 387.)

What now is the status of liquors during this priod from 1919 to 1933 as it appears from the decisions of the United States Supreme Court? The status is as follows:

a. Liquors have been entirely divested of their interstate character insofar as the regulation thereof by a state of their manufacture in, importation into, exportation from, or use therein is concerned, and

such regulation is free from any restraints of the commerce clause of the United States Constitution.

b. The power to prohibit liquors both intrastate and among the several states is vested in the National Government.

c. A state, in the exercise of its police power could enact laws prohibiting the manufacture in, importation into, exportation from, and use of liquors within its borders freed from any restraint by the Federal Constitution.

E. From the adoption of the Twenty-first Amendment to the presentation of indictment herein in May of 1941.

On December 5, 1933, the Twenty-first Amendment to the Constitution became effective.

By section 1 of the Amendment, the Eighteenth Amendment was repealed and all laws to the extent that their provisions rested upon that Amendment fell. The Wilson Act and the Webb-Kenyon Act were both passed prior to the adoption of the Eighteenth Amendment. They were enacted by the Congress pursuant to the power delegated to it by the commerce clause of the Constitution. And since these acts were consistent with the Eighteenth Amendment, they remained in effect during the whole of the period of the Eighteenth Amendment.

Had the Twenty-first Amendment simply repealed the Eighteenth Amendment, and nothing more, the respective positions and powers of the National Government and the States would have been exactly what they were prior to the adoption of the Eighteenth

Amendment. But the Twenty-first Amendment provided by Section 2 that "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof" was prohibited.

Prior to the adoption of the Eighteenth Amendment, the National Government had authority, by virtue of the commerce clause, to regulate liquors in interstate commerce in any manner it deemed to be best. However, as the Court said in *U. S. v. Chambers* (1933) 291 U. S. 217, 78 L. Ed. 763,

> "the people are free to withdraw the authority they have conferred and, when withdrawn, neither the Congress nor the Courts can assume the right to continue to exercise it." (p. 226.)

The Twenty-first Amendment, on its face, is a limitation on the power of the National Government in respect of the regulation of liquors in interstate commerce, enjoyed by the National Government under the commerce clause prior to the adoption of the Eighteenth Amendment. As has been shown, while formerly a state might not pass a law regulating liquors which, save as sanctioned by the Wilson Act or the Webb-Kenyon Act, in any way unduly burdened or interfered with interstate commerce, after the adoption of the Twenty-first Amendment, according to the decision in *Ziffrin Inc. v. Reeves* (1939) 308 U. S. 132, 84 L. Ed. 128, sanction was given to

> "the right of a state to legislate concerning intoxicating liquors brought from without, un-

> fettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them." (p. 138.)

As was further stated in *Premier-Pabst Sales Corp. v. Grosscup* (1935) 12 F. Supp. 970 (affirmed in 298 U. S. 266, 80 L. Ed. 1155), neither

> "the Webb-Kenyon Act or the Twenty-first Amendment withdraws intoxicating liquor from the subjects of interstate commerce. Clearly neither does of itself because such liquors continue to be the subject of such commerce until the state has acted. As soon, however, as the importation is forbidden by a state law, the importation is forbidden by the Constitution and laws of the United States. In this respect, intoxicating liquor is made an exception to other subjects of interstate commerce." (p. 973.)

Further, according to the *Grosscup* decision,

> "if it (intoxicating liquor) cannot be imported without a violation of a law of the state, its importation is declared unlawful by the Webb-Kenyon Act and by the Twenty-first Amendment, and it is hence without the operation of the commerce clause." (p. 973.)

Since the adoption of the Twenty-first Amendment in 1933, what has been and what is now the status of liquors as revealed by the decisions of the United

States Supreme Court and by decisions of the lower Courts that have been affirmed by the Supreme Court? The status is as follows:

a. Wherever and whenever a state has exercised its police power and enacted thereunder laws for the regulation of intoxicating liquors, such liquors whether manufactured in the state or imported into the state are immediately withdrawn from the operation of the commerce clause and become clothed with all the incidents and characteristics of a domestic commodity and subject to all regulatory laws of the state free from and unfettered by any considerations arising out of the commerce clause of the United States Constitution or the equal protection clause of the Fourteenth Amendment to that Constitution.

b. The power of the National Government to regulate the transportation, importation and use of liquors has been limited and qualified by the 21st Amendment.

c. The power of a state to regulate the transportation, importation and use of liquors is absolute and unfettered by any provisions of the United States Constitution as to all liquors manufactured within the state or transported into the state for use within the state.

The foregoing historical summary, although lengthy, places us now in a position properly to analyze and determine the present situation with reference to regulation of commerce in intoxicating liquors.

III.

THE TWENTY-FIRST AMENDMENT HAS QUALIFIED AND LIMITED THE COMMERCE CLAUSE SO FAR AS INTOXICATING LIQUORS ARE CONCERNED, AND HAS REMOVED THEM FROM ITS OPERATION WHERE THE STATE HAS ADOPTED LAWS REGULATING THE IMPORTATION AND SALE OF SUCH INTOXICATING LIQUORS.

Section 2 of the Twenty-first Amendment provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In its very first declaration upon the subject of the Twenty-first Amendment, the Supreme Court of the United States said in *U. S. v. Chambers,* supra, at pp. 225-6:

> "Over the matter here in controversy, a power has not been granted but has been taken away. The creator of Congress has denied to it the authority it formerly possessed and this denial, being unqualified, necessarily defeats any legislative attempt to extend that authority."

A three-judge Federal Court, in the decision in *Premier Pabst Sales Co. v. Grosscup* (1935) 12 Fed. Supp. 970, affirmed, 298 U. S. 266, 80 L. Ed. 1155, declared that

> "* * * the measure of control which the states may exercise is determined by the States themselves. * * * Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United

States forbids its further importation if in violation of the laws of the state. (pp. 971-972.)

"* * * such liquors continue to be the subject of such commerce until the state has acted." (p. 973.)

Another three-judge Federal Court declared that the power is "now returned to the states by the Twenty-first Amendment to regulate or forbid the importation of liquor".

Zukaitis v. Fitzgerald (1937) 18 Fed. Supp. 1000.

It was said in another case that the power of the states to control the traffic in liquor under the Twenty-first Amendment is "absolute" and that the power is not limited by the commerce clause of the Constitution.

Wylie v. State Board of Equalization (1937) 21 Fed. Supp. 604.

In still another decision by a three-judge Court, later affirmed by the Supreme Court, it was said that "So far as that one commodity is concerned, the nation again is in the same situation in which it was as to all commerce before the adoption of the Constitution."

Joseph S. Finch & Co. v. McKittrick (1938) 23 Fed. Supp. 244, affirmed in 305 U. S. 395, 83 L. Ed. 246.

Earlier rulings under the commerce clause are no longer applicable.

The decisions of the Supreme Court dealing with the Twenty-first Amendment as applicable to com-

merce in intoxicating liquors between states point clearly to the conclusion that by the Amendment the Constitution has withdrawn intoxicating liquors from the operation of the commerce clause in all cases where the states have adopted laws regulating the importation and sale of intoxicating liquors.

Before considering those decisions, we refer to certain principles which have been determined by the decisions under the commerce clause. First, the jurisdiction of Congress over commerce in intoxicating liquors, where it existed, was exclusive of state control over the subject. (*Leisy v. Hardin* (1889) 135 U. S. 100, 34 L. Ed. 128; *In re Rahrer* (1890) 140 U. S. 545, 35 L. Ed. 572; *Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 196, 59 L. Ed. 1267.) As the Supreme Court declared in the *Passenger Cases* (1849) 7 How. 283, 396, 12 L. Ed. 702, 749:

> "A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution."

Second, the commerce power of Congress, where it existed, excluded the police power of the state to deal with the importation and sale of commodities, whether Congress had legislated upon the subject or not (*Leisy v. Hardin* (1889) 135 U. S. 100, 109, 34 L. Ed. 128, 132.)

Third, the commerce clause conferred the right to import merchandise into any state free except as Congress might otherwise provide.

Fourth, the commerce clause prevented discrimination by the states in the exercise of their police power

against commodities imported from without the state, and the commerce clause was not to be "fettered" by legislation discriminating in favor of intrastate business. (*Best & Co. v. Maxwell* (1940) 311 U. S. 454, 85 L. Ed. 275.) It was to prevent such discrimination that the commerce clause was adopted. (*South Carolina etc. Dept. v. Barnwell Bros.* (1938) 303 U. S. 177, 187, 82 L. Ed. 734.)

The foregoing principles are inherent in the commerce clause and in the applicability thereof. We shall show that none of these principles are now applicable to intoxicating liquors by reason of the Twenty-first Amendment, and the commerce clause is not now applicable to intoxicating liquors where the state has undertaken to regulate the traffic in them.

In *State Board of Equalization v. Young's Market Co.* (1936) 299 U. S. 59, 81 L. Ed. 38, the Supreme Court was considering the California liquor control Act which imposed a license fee for importing beer, and which was attacked upon the ground that it violated the commerce clause and the equal protection clause of the Constitution. The Court there said:

> "Prior to the Twenty-first Amendment, it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and *the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. The exaction of a fee for the privilege of importation would not, before the*

Twenty-first Amendment, have been permissible even if the State had exacted an equal fee for the purpose of transporting domestic beer from its place of manufacture to the wholesaler's place of business. * * *"

"The Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' *abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.* The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it." (p. 62.)

"The plaintiffs argue that, despite the Amendments, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the state may adopt a lesser degree of regulation than total prohibition. *Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?"* (Italics ours.) (p. 63.)

In *Mahoney v. Joseph Triner Corp.* (1938) 304 U. S. 401, 82 L. Ed. 1424 (reversing 11 Fed. Supp. 145 and 20 Fed. Supp 1019) the liquor control act of Minnesota was attacked upon the ground that it was discriminatory. The Court said (p. 403):

> "The sole contention of Joseph Triner Corporation is that the statute violated the equal protection clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that *since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor. As we are of the opinion that the latter contention is sound, we shall not discuss whether the statutory provision is a reasonable regulation of the liquor traffic.*
>
> "* * * The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. For only that locally processed may be sold regardless of whether the brand has been registered. *That, under the Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by State Board of Equalization v. Young's Market Co. * * *"* (Italics ours.)

In *Indianapolis Brewing Corp. v. Liquor Control Com.* (1939) 305 U. S. 391, 83 L. Ed. 243 (affirming 21 Fed. Supp. 969), the plaintiff sought to have the Michigan statute declared unconstitutional, upon the ground that it discriminated in treatment of beer imported from different states and violated the equal protection clause. The Court said (p. 394):

"Whether the Michigan law should not more properly be described as a protective measure, we have no occasion to consider. *For whatever its character, the law is valid. Since the Twenty-first Amendment, as held in the Young's Market Co. Case the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.* * * * The further claim that the law violates the due process clause is also unfounded. The substantive power of the state to prevent the sale of intoxicating liquor is undoubted." (Italics ours.)

In *Joseph S. Finch & Co. .v. McKittrick* (1939) 305 U. S. 395, 83 L. Ed. 246 (affirming 23 F. Supp. 244), the Missouri law prohibited the sale of liquors manufactured in states which had laws discriminating against liquors manufactured in other states; and it was claimed that the law violated the commerce clause and equal protection clause. The Court said (p. 397):

"The claim of unconstitutionality is rested, in this Court, substantially on the contention that the statute violates the commerce clause. *It is urged that the Missouri law does not relate to protection of health, safety and morality, or the protection of the social welfare, but is merely an economic weapon of retaliation; and that, hence, the Twenty-first Amendment should not be interpreted as granting power to enact it. Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.* As was said in State Board of Equalization v. Young's Market Co., 299 U. S. 59, 62, 57 S. Ct. 77, 78, 81 L. Ed. 38, 'The words used are apt to confer upon the state the power to forbid all importations

> which do not comply with the conditions which it prescribes.' *To limit the power of the states as urged 'would involve not a construction of the Amendment, but a rewriting of it.'* " (Italics ours.)

In *Ziffrin, Inc. v. Reeves* (1939) 308 U. S. 132, 84 L. Ed. 128 (affirming 24 Fed. Supp. 924), the Kentucky Control Act was attacked on the ground that it impaired plaintiff's rights under the Commerce Clause and deprived it of due process and equal protection under the Fourteenth Amendment. The Kentucky Act was a comprehensive measure designed rigidly to regulate the production and distribution of intoxicating liquors; "every phase of the traffic is declared illegal unless definitely allowed". The lower Court had rejected the appellant's contentions, including the one that intoxicating liquors were legitimate articles of commerce unless federal law had declared otherwise. The Supreme Court said (p. 138):

> *"The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.* Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, *she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.* * * *
>
> "Having power absolutely to prohibit manufacture, sale, transportation or possession of intoxicants, was it permissible for Kentucky to *permit*

*these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less * * * The state may protect her people against evil incident to intoxicants * * * and may exercise large discretion as to means employed.* (Italics ours.)

"* * * The statute declares whisky removed from permitted channels contraband subject to immediate seizure. This is within the police power of the state; and property so circumstanced cannot be regarded as a proper article of commerce."

At page 140, referring to *State Board of Equalization v. Young's Market Co.,* 299 U. S. 59, 63 and *Clason v. Indiana,* 306 U. S. 439, the Court said:

"The two cases last cited recognize that the State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

It therefore clearly appears from the decisions of the Supreme Court of the United States that the Twenty-first Amendment is a limitation upon the power of the federal government under the Commerce Clause. Formerly the state could not adopt any law which burdened commerce between the states; under the Twenty-first Amendment the state can do so, so far as intoxicating liquors are concerned.

An unlimited power to regulate commerce in liquors is now vested exclusively in the states.

Since the Twenty-first Amendment, the right of a state to prohibit or regulate the importation of intoxi-

cating liquors is *not limited by the Commerce Clause.* That Amendment sanctions the right of the state to legislate concerning intoxicating liquors brought from without "unfettered by the Commerce Clause". That Amendment has abrogated the right to import free, so far as concerns intoxicating liquors. The words used in the Amendment are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. The state might even regulate the traffic by establishing a state monopoly of the manufacture and sale of beer or "channelize" importations by confining them to a single consignee. The state may now exercise "full police authority".

The power which is now conferred upon the states by the Twenty-first Amendment to the Constitution can no longer exist in Congress. The exclusive power of Congress over commerce in intoxicating liquors has ceased to exist, and has been removed by the Amendment in all cases where the state has acted to regulate the traffic. There is no such anomaly under the Constitution as a concurrent power to regulate commerce. The power of Congress has, therefore, been excluded. On the other hand, the power of the state in the exercise of its police power over the subject has been described as "full police authority". This power of the state has been made applicable to the subject by force of the Twenty-first Amendment. The police power is "complete, unqualified and conclusive". (*The License Cases* (1847) 46 U. S. 504, 631, 12 L. Ed. 256.) Under the Twenty-first Amendment, the power of the state is not limited by the Commerce Clause.

That the full police power over intoxicating liquors has been vested in those states which have undertaken to regulate the traffic, free of constitutional limitations, clearly appears from those decisions which hold that by virtue of the Twenty-first Amendment the state may discriminate against imported liquors, unlimited by the commerce clause, and that the equal protection clause is not now applicable to the regulation by the state of the traffic in intoxicating liquors. The commerce clause, if applicable, would by its own force not be "fettered" by legislation discriminating against imports. It is now held, however, that the state may so discriminate "unfettered by the Commerce Clause".

The only conclusion which can follow from the decisions is that the commerce clause is not now applicable to importations of intoxicating liquors into those states where the state has adopted laws to regulate the traffic, but that intoxicating liquors in such cases are within the full police authority of the state and are not to be regarded as a proper article of interstate commerce.

Since the commerce clause is not applicable to the importation and sale of intoxicating liquors, under the Twenty-first Amendment, in cases where the state has acted to prohibit or regulate the importation of intoxicating liquors, as will be shown in the next two sections of this brief, the Sherman Act cannot be applicable in the case at bar, where all of the states in the Pacific Coast Area have adopted complete and comprehensive regulations for the importation and sale of intoxicating liquors and have also adopted laws against the restraint of trade and commerce.

IV.

UNDER THE WEBB-KENYON ACT IMPORTATION OF INTOXICATING LIQUORS HAS BEEN DIVESTED OF ITS INTERSTATE CHARACTER, UNDER FACTS ALLEGED IN THE INDICTMENT.

If intoxicating liquor cannot be imported into a state without a violation of the laws of the state, its importation is declared to be unlawful by the Webb-Kenyon Act, as well as by the Twenty-first Amendment, and hence is without the operation of the commerce clause. (*Premier Pabst Sales Co. v. Grosscup* (1935) 12 Fed. Supp. 970, affirmed in 298 U. S. 226, 80 L. Ed. 1155.)

Under the Webb-Kenyon Act, as we have heretofore shown, the movement of liquor in interstate commerce, as well as its receipt, possession and right to sell, if prohibited by the state law, is in express terms divested of its interstate character. (*James Clark Dist. Co. v. Western Maryland R. Co.* (1916) 242 U. S. 311, 325, 61 L. Ed. 326.) The very purpose of the Act, as shown by its title, was to divest intoxicating liquors of their interstate character in certain cases provided by the Act. (*Adams Express Co. v. Kentucky* (1914) 238 U. S. 190, 198, 59 L. Ed. 1267.)

The defendants in this case are charged with the importation and sale of liquor pursuant to a conspiracy to fix and maintain artificial and non-competitive prices in the sale and distribution thereof. Each of the states in question has adopted a complete set of special and general laws regulating the manufacture, use, sale, exportation and importation of beer, and also each of said states has laws forbidding re-

straints of trade or commerce or the fixing or maintaining of artificial or non-competitive prices of commodities, including within their scope intoxicating liquors.

If, therefore, the defendants have imported beer into the State of Washington, for instance, under the facts alleged in the indictment, it would constitute a violation of the Webb-Kenyon Act, which by its express terms divests the transaction of its interstate character, and makes the law of the state paramount in dealing with such importations and sale.

Such beer, therefore, under the Webb-Kenyon Act, would not be sold in or be a subject of interstate trade and commerce.

V.

UNDER THE WILSON ACT, THE ALLEGED CONSPIRACY RELATES ONLY TO A DOMESTIC ARTICLE SUBJECT ONLY TO THE POLICE POWER OF THE STATE.

The Wilson Act was enacted to limit the effect of the regulations of commerce among the several states. (See title of Act, 26 Stat. 313, 27 U. S. C. A., sec. 121.) That Act, like the Webb-Kenyon Act, was not repealed by the Eighteenth Amendment or the National Prohibition Act, but continued in force.

By virtue of that Act, intoxicating liquors transported into any state or territory, upon arrival and before sale, become subject to the operation and effect of the laws of that state or territory to the same extent and in the same manner as though such liquor had been produced in such state or territory. They

are thus placed "within the category of domestic articles of a similar nature" and the purpose of the Act is to make such liquor after its arrival "a domestic product and to confer power upon the states to deal with it accordingly" and the police power of the state is measured by the right of the state to control or regulate domestic products—a state and not a federal question as respects the commerce clause of the Constitution.

Under the Wilson Act, therefore, the subject matter of the alleged conspiracy, relating to the sale and distribution of beer, is an article which *necessarily becomes,* as a matter of law, a *domestic product,* and its sale and distribution is a matter of intrastate commerce, *"to the same extent and in like manner as though produced in such state or territory".*

There can be no question but that a conspiracy with reference to the sale and distribution of beer manufactured and sold in the State of Washington relates solely to intrastate commerce and is to be governed by the state laws, as was stated in *Gibbs v. McNeeley* (1901) 107 Fed. 210, where the Court said (at p. 212):

> "The sale and the manufacture cannot be distinguished, so far as the question of state control is concerned; both take place within the state; both are equally within its police power; both affect interstate commerce in the secondary sense merely; neither affects it in the primary sense."

The alleged conspiracy being one relating to the sale and distribution of beer produced and sold in the state, it is not subject to the operation of the Sherman Act; it is intrastate commerce.

VI.

CONCLUSION.

The conspiracy alleged in Count One of the indictment was to commit an act, in respect to beer, within a state that had a complete system of laws regulating intoxicating liquors including beer. This being true, the conspiracy was to do an act in respect of a commodity while clothed with the characteristics of a domestic commodity of the state.

It is respectfully submitted that for the reasons above stated, Count One of the indictment does not charge a public offense or a crime under the Sherman Act.

Count Two of the indictment alleges a violation of section 3 of the Sherman Act. The violation of this section is alleged to have been accomplished by a conspiracy to raise, fix, stabilize and maintain uniform, artificial and non-competitive prices for beer *sold and shipped* in trade and commerce between states of said Pacific Coast Area and the Territory of Alaska and that the defendants in pursuance of the conspiracy did the things they conspired to do as respects "prices in the sale of beer in trade and commerce between the states of said Pacific Coast Area and the Territory of Alaska". (Paragraph 21 of Indictment.)

Here again this Court will take judicial notice of the fact that the Territory of Alaska has a complete set of laws regulating the manufacture, use and sale of beer within its borders, and, furthermore, has adopted the common law as respects restraints of trade and commerce.

This being true, such Territorial laws are paramount and exclusive of the laws of the National Government on the same subject. And the same argument and reasoning that applies respecting Count One applies to Count Two.

It is respectfully submitted that Count Two does not charge a public offense under section 3 of the Sherman Act.

Wherefore, these appellants respectfully submit that the judgment of the District Court be reversed; that the demurrers of these appellants to the indictment herein be sustained; that the charge against these appellants be dismissed and they and each of them be discharged.

Dated, San Francisco,
February 1, 1943.

Respectfully submitted,
R. M. J. Armstrong,
Albert L. Campodonico,
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Regal Amber Brewing Company
and William P. Baker.

(Appendix Follows.)

Appendix.

Index to Appendix

Appendix

THE WASHINGTON LIQUOR CONTROL ACT.

At an Extraordinary Session called for that purpose, in the year 1933, the legislature of the State of Washington adopted the Washington State Liquor Act (Rem. Rev. Stat., Sec. 7306-1, *et seq.*). That act provides for a system generally known as a "State Monopoly System" of liquor control. By that act all spirituous liquors are sold through a monopoly created and operated by the state itself. Wine and beer, with certain limitations, may be sold under restricted licensing conditions. By Sec. 79 the Washington State Liquor Control Board is given the broadest possible power to "make such regulations not inconsistent with the spirit of this act as are deemed necessary or advisable", which regulations, when promulgated as provided for, "thereupon shall have the same force and effect as though incorporated in this act". Because of this broad regulatory power we will hereafter refer to provisions of the act itself and regulations adopted thereunder indiscriminately.

Under Sec. 23 of the act various types of licenses and the fees to be charged therefor are described.

Sec. 23-F of the act provides that every manufacturer of malt liquor located outside the State of Washington, in order to sell his product to a wholesaler or beer importer licensed by the State of Washington, must obtain from the Washington State Liquor Control Board a certificate of approval, which can be obtained by meeting certain conditions set forth

therein and which may be revoked at the discretion of the Board.

Sec. 23-G provides for the licensing of beer importers and limits the importation of beer into the State of Washington or its transportation into the state to persons holding such license. It further prohibits the sale of such beer by an importer to any licensee or other person except licensed beer wholesalers.

Sec. 23-H makes it unlawful for any retail licensee to purchase beer from anyone other than a duly licensed beer wholesaler, and likewise restricts purchases of a brewer or a beer wholesaler to those made from a duly licensed wholesaler or importer.

Sec. 23-I prohibits canvassing, soliciting, receiving or taking orders for beer, and the contacting of any retail licensee in good will activities by any person other than an accredited representative of a person, firm or corporation holding a beer wholesaler's, brewer's or beer importer's license, and who, in addition, shall have individually procured an agent's license.

Sec. 27-D provides that every licensed brewer and beer importer shall be responsible for the conduct of any licensed beer wholesaler in selling or contracting to sell to retail licensees beer manufactured by such brewer or imported by such importer, and provides that the liquor control board may penalize the brewer or importer for violations of law committed by the wholesaler in the sale of the brands of beer manufactured by the brewer or imported by the importer,

irrespective of whether the brewer or importer actually participated in the violation.

Sec. 30 of the act prohibits brewers and wholesalers from giving liquor to any person, with limited exceptions.

Sec. 43 gives the board complete power to regulate advertising, and Sec. 44 describes the label which must appear on all packages of malt beverages.

Sec. 62 provides that "the action, order or decision of the board as to any permit or license shall be final and shall not be reviewed or restrained by injunction, prohibition or other process or proceeding in any court".

We have already referred to Sec. 79 and the general power of regulation which it confers on the board. Subparagraph "r" of Sec. 79 perhaps requires special mention, and it reads as follows:

> "r. prescribing the conditions, accommodations and qualifications requisite for the obtaining of licenses to sell beer and wines, and regulating the sale of beer and wines thereunder."

Sec. 90 provides that no manufacturer or wholesaler or person financially interested directly or indirectly in such business shall have any financial interest, direct or indirect, in any licensed retail business nor own any property upon which retail business is conducted, nor advance money or moneys' worth to any retailer under any arrangement whatsoever, and prohibits any retailer from receiving any advance of money or moneys' worth. It further makes a manufac-

turer and wholesaler ineligible to receive or hold a retail license and prohibits a manufacturer or wholesaler from selling liquor at retail. It defines financial interest as any interest, whether through stock ownership, mortgage, lien, interlocking directors or otherwise.

Sec. 91 makes the violation of any provision of the act or regulations adopted pursuant to the act a violation of the act, whether specifically declared to be so or not.

The regulations of the board as heretofore published are consecutively numbered and codified under nine titles. Those to which we desire to draw particular attention are as follows:

Regulation 17 prohibits exclusive contracts between manufacturers, wholesalers and importers on the one hand and retail licensees on the other.

Regulation 18 prohibits manufacturers, wholesalers and importers from directly or indirectly soliciting, giving or offering to any retail licensee or employee any gifts, discounts, loans of money, premiums, rebates, free beer or wine, treats, or property or services of any nature whatsoever, and prohibits retail licensees from soliciting or receiving any of the foregoing. It also prohibits the furnishing, renting, lending or selling by a manufacturer, wholesaler or importer of any equipment, fixtures or supplies to any retailer, and prohibits any retailer from accepting the same.

Regulation 41 prohibits any retail licensee from buying or accepting delivery of beer except for cash paid at the time of or prior to delivery.

Regulation 44 prescribes the size of barrels and packages in which manufacturers, distributors or wholesalers shall sell their product.

Regulation 49 provides for the posting of prices according to zones as fixed and adopted by the board from time to time. It provides, that every licensed brewer and importer shall file price postings showing the wholesale prices at which all brands of beer manufactured or imported shall be sold in each zone, which prices shall be uniform for all retail licensees in any zone; that no beer wholesaler shall sell or offer to sell beer to any retailer at a price differing from that posted by the brewer manufacturing or the importer importing such beer; that no price posting shall become effective until ten (10) days after actual filing, and that no posting involving quantity discounts shall be made; that every brewer and importer shall file with the board a copy of every written contract or memorandum of every oral agreement between the brewer or importer and any beer wholesaler showing all terms of sale; that no licensed brewer or importer shall sell beer to any wholesaler unless such contract or memoranda are on file; that all price postings, contracts and memoranda shall be open to inspection and not considered confidential.

Regulation 50 provides the only method by which refunds can be made for spoiled beer.

Regulation 51-A provides that wholesalers, brewers and importers shall sell to retailers only for cash.

Regulations 52, 53, 54 and 55 provide that beer importers shall maintain a principal office, warehouses

for the storing of beer imported, shall keep on file with the board labels used on all beer imported, and shall not import or cause to be transported into the state any brand of beer unless such importer has filed with the board a notice of intention to import and has ascertained that the brewer manufacturing such beer is the holder of a certificate of approval.

Regulation 58 describes forms and reports to be made by holders of certificates of approval.

THE OREGON LIQUOR CONTROL ACT.

The Oregon Liquor Control Act, adopted at a Special Session of the Oregon Legislature (Laws of 1933 (2d S.S.) Chap. 17), is in all essential respects similar to the Washington Act. It also provides for a "State Monopoly System" of liquor control. Its provisions permit the sale of spirituous liquors only through a monopoly operated by the State itself. Wine and beer are permitted to be sold under restricted license conditions. A commission is created to operate the state monopoly and to regulate licensees.

Sec. 24-104 creates the commission, and Sec. 24-105, *et seq.,* defines its powers in general.

Subsec. (d) of Sec. 24-106, invests the commission with the power to control the manufacture, possession, sale, purchase, transportation, importation and delivery of alcoholic liquor, and Subsec. (h) empowers the commission to adopt regulations which shall have the full force and effect of law.

Sec. 24-118 provides for various types of licenses and the fees to be charged therefor.

Subsec. (b) of this section provides for a salesman's license and restricts the selling, soliciting or taking orders for alcoholic beverages to holders of such licenses, and makes it unlawful for such licensee to have any interest of any nature in the business or merchandise of any retail licensee.

Secs. 24-120 and 24-122 provide the grounds for refusing and canceling of licenses, and Subsec. 4 of each section provides as a ground that any applicant or licensee has been financed or furnished with money or property or received gratuities or rebates from any manufacturer or wholesaler.

Secs. 24-202 to 24-207 prohibit the manufacturer or wholesaler from having any interest in a retailer's premises, or furnishing any financial assistance, and prohibit a retailer from having any interest in the manufacturer or wholesaler, prohibit the furnishing of money, equipment or property or the giving of gratuities or rebates, and prohibit the acceptance of same by the retailer, providing for punishment of violations.

Regulation 9 of the Oregon Liquor Control Commission provides that all sales must be made for cash.

Regulation 10 provides for the posting of beer prices upon schedules which shall be uniform for the same class of trade buyers in the same trade area, and provides for the method of filing and changing filings and the time when such filings shall become effective, and providing for the closing out of brands under terms and conditions as set forth.

Subsec. (c) of the regulation provides for bad order claims and the conditions under which refunds may be made.

Subsec. (d) prohibits sales for future delivery and comprehensively prohibits the giving of any financial assistance.

THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

The Alcoholic Beverage Control Act of California (Chap. 330, Laws of 1935), while not identical with either the Washington or Oregon law, contains, insofar as this present action is concerned, similar and, in some cases, identical provisions. The California act does not provide for the "State Monopoly System", but provides for the licensed sale of spirituous, vinous and malt liquors. The enforcement of the act is placed under the jurisdiction of the State Board of Equalization.

Sec. 5 of the act provides for the licensing of all persons engaged in the traffic, including importers.

Sec. 6 defines the privileges of licensees, including importers, who are privileged to import and export alcoholic beverages, and restricts wholesalers' licenses to persons doing a *bona fide* wholesale business, and prohibiting the sale by a wholesaler licensee to himself as a retail licensee.

Sec. 6.6 provides that no retail licensee may purchase from any person, except the holder of a manufacturer's or wholesaler's license.

Sec. 38e provides for the posting of prices by manufacturers, importers and wholesalers of beer, the period within which such prices so posted shall become effective, that prices so posted shall be strictly adhered to, and in general, contains provisions similar to the regulations in Oregon and Washington. This section also provides that "the Board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer", and provides for the dividing of customers into functional classes, and the establishing different prices for the same article for different functional classes, and provides that any trade association having as members licensed beer manufacturers representing more than half of the volume produced and sold in California may maintain an action to enjoin acts in violation of this section, and provides that the board may suspend or revoke licenses for three separate violations of this section committed within a period of one year.

Sec. 54 provides that no manufacturer, manufacturer's agent, importer or wholesaler, or any officer, director or agent thereof may hold any direct or indirect ownership of any interest in a retail license, or furnish, give or lend any money or other thing of value, or equipment, fixtures or supplies or decorations, paintings, signs, etc., to, or own any interest, directly or indirectly in the business, furniture or fixtures, or in the realty of any retail licensee, or deliver beverages on consignment, or give any free goods or secret rebates or commissions to any retailer, or any employee of such retailer, or directly or indi-

rectly hold any interest by any means in any firm or business furnishing, supplying or dealing in any office, store, restaurant, or other equipment.

Sec. 54.5 prohibits the holding by any on-sale retail licensee or any officer, director, employee or agent thereof, of any ownership or interest, directly or indirectly, in any manufacturer's, importer's or wholesaler's license.

Sec. 55.5 provides for contracts for the resale of trade marked or branded products at stipulated prices, and for the stipulation of resale prices for the sale of close out stocks after first offering such stocks to the manufacturer thereof.

Sec. 55.7 prohibits any licensee from directly or indirectly giving any premium, gift or free goods in connection with any sale of alcoholic beverages.

Sec. 55.8 provides that the board may adopt rules and regulations restricting credit.

Sec. 66 provides that only such alcoholic beverages as shall be in continuous transit through the state shall be exempt from the provisions of the act.

THE IDAHO LIQUOR ACT.

While the State of Idaho has what is known as a "State Monopoly System", whereby the sale of spirituous and vinous liquors is under the control of the Idaho Liquor Control Board and merchandising is solely through the state conducted monopoly, beer is manufactured and sold under a different act, plac-

ing the supervision in the Department of Law Enforcement. The Beer Control Act (Chap. 132, Laws of 1935) provides for the sale of beer under a licensing system therein provided.

Sec. 6 of the act provides for a certificate of approval as a condition precedent to the sale of any beer in Idaho manufactured outside of the state, and such certificate of approval may be revoked by the Commissioner of Law Enforcement; provides further that no wholesaler or dealer shall sell beer in the State of Idaho, except from stocks of merchandise in the State of Idaho, and also provides that schedules of prices shall be filed with the Commissioner, which shall be uniform for the same class of trade buyers in the same area, providing for the date upon which such filings shall become effective and the method of changing such filings, and providing that such filings shall be strictly adhered to.

This section further provides the size of packages and containers in which beer may be sold, and provides that no sale shall be made except for cash, and that no person shall sell or solicit or take orders for beer without having a permit issued by the Commissioner.

This section also provides that it is unlawful for any dealer, brewer or wholesaler, or person financially interested, directly or indirectly, therein to have any financial interest in any retail licensee's business or the property upon which the business is conducted, or to aid, directly or indirectly, such licensee by gifts, loans of money, property of any description, or services of any nature, or by giving premiums or rebates, and prohibits the furnishing, lending, renting or sell-

ing of any equipment, fixtures or supplies, and prohibits any contract to control the product or products handled by the retailer.

ALASKA LIQUOR CONTROL ACT.

Immediately after the ratification of the Twenty-First Amendment Alaska passed an Act regulating the sale of beer and wine, Chap. 71, Laws of 1933, and an act creating a Board of Liquor Control, Chap. 109, Laws of 1933. These enactments were specially ratified by Congress by Sec. 3 of the Repeal Act for Alaska, 48 Stat. 583.

By Section 2 of this latter act it is provided that the legislative power of the territorial assembly be extended to include the regulation of intoxicating liquor traffic and authorizes the legislature to delegate its authority to a Board or Commission with power to make rules and regulations.

Subsequently the Territorial legislature adopted a new Liquor Control Act, Chap. 78, Laws of 1937, which limits the sale of intoxicating liquors to and by licensees (except consumers), requires brewers and wholesalers whose plant or principal place of business is outside the territory to obtain a wholesaler's license, and to establish a principal place of business and designate a resident agent within the Territory, and provides for a malt beverage importer's license.

This Act also prohibits the ownership of any interest in a beverage dispensary or retail liquor store by a wholesaler or brewer and also prohibits direct or

indirect financing of, or supplying equipment or furnishings to, any retailer.

All of these laws have common characteristics, to which we especially desire to draw the Court's attention:

(1) In each case the State asserts complete and absolute control over the possession, sale, transportation, importation and exportation of intoxicating liquor during all of the time that such intoxicating liquor is within the geographical jurisdiction of the State. Legislative provision is made for every possible contingency so that no situation could arise where the law of the State would be inapplicable.

(2) Under the provisions of each law the traffic is limited to persons licensed by the State to engage therein, with complete definition of the rights and privileges under which such persons may so engage.

(3) Each act channelizes importations, subjecting them immediately upon arriving within the geographical jurisdiction of the State to all of the conditions and restrictions relating to the traffic.

(4) Two of the acts (Washington and Idaho) create a condition precedent to importation by providing for what is known as certificates of approval, which take effect prior to any attempted importation.

(5) Each of the acts controls the economic conduct of the trade and commerce and affirmatively restrains trade, making mandatory practices which in other pursuits have been declared to violate the Sherman Act.